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THE VALIDITY OF ATTACHMENTS MADE ABROAD BY CREDITORS OF AN INSOLVENT DEBTOR.

IN a widely extended business it frequently happens that the assets of the business are situated in several jurisdictions and debts are due to and by citizens of several countries; so that upon the bankruptcy of those carrying on the business, difficult questions arise concerning the effect in foreign jurisdictions of the action of the bankruptcy court of the bankrupts' domicile.

Such questions have been discussed by writers on international law and the conflict of laws for a long time, and many points have become settled either by statutory provisions or by judicial decisions. Thus in all civilized countries foreign creditors stand on quite or nearly the same footing as domestic ones, as regards the proof of claims. And on the continent of Europe generally, on proof that judgment of bankruptcy has been rendered against the debtor in his domicile, foreign courts will order payment or delivery of the debtor's property situated within their jurisdiction to the assignees in bankruptcy, free from any liens of creditors made after the bankruptcy. In England, also, so far as chattels and choses in action are concerned, the rights of a foreign assignee in bankruptcy are recognized as controlling from the date of the bankruptcy.

It may happen, however, either from considerations of con-

venience or because of the unsatisfactory remedy afforded in a foreign court, that an assignee under an English bankruptcy prefers to enforce his rights in an English court to the property of the bankrupt situated abroad, if that court can obtain jurisdiction. If, for instance, an English creditor on learning of the bankruptcy has obtained full satisfaction of his debt out of property of the bankrupt situated abroad, the assignee may be able to pursue his remedy at home, as the English court has jurisdiction over the English creditor. In such cases the distinction is taken between property which would have come into the hands of the assignee for distribution among the general creditors and that which would not have become thus available for distribution. If an English creditor gets possession of property of the latter class, he may retain it and still prove his debt, but otherwise in regard to property of the former class. The principle is thus stated by Baron Parke in the case of Cockerell *v.* Dickens, 3 Mo. P. C. 132: "If the real estate in Java did not pass by the assignment . . . nor could in any way be got hold of and made available by the assignees for the payment of the general creditors, any individual creditor who could obtain it by due course of law would have a right to hold it, and if he duly proved the debt due to him before he had been paid any part of the debt so proved by means of that estate, he would be entitled to receive the dividends under the insolvent estate until he had been paid altogether twenty shillings in the pound, exactly in the same way as if a creditor had had a security on the real estate or personal credit of a third person. In this case he could neither be compelled to refund the money obtained by means of the real estate or the dividends received on the debt, or be restrained from receiving those hereafter to become due. The principle is that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors and at the same time be allowed to come in *pari passu* with the other creditors for satisfaction out of the remainder of that fund; and this principle does not apply where that creditor obtains by his diligence something which did not and could not form a part of that fund."

As an English bankruptcy is ordinarily held not to affect the title to real estate, an English creditor may usually retain an advantage secured by an execution or attachment of real estate of his debtor situated abroad, while an advantage secured by attach-

ment or execution of movables must be surrendered.[1] If execution be levied or even an attachment made before the bankruptcy, the creditor may, however, retain the advantage which he has thereby gained, for the English bankruptcy law seeks only to vest in the assignee title to the bankrupt's property as it existed at the time of the bankruptcy and subject to all liens and equities existing at the time. Where a bankruptcy and an attachment abroad of the bankrupt's property there by an English creditor took place on the same day, Lord Eldon allowed an inquiry to be made as to the hour of the day when each took place, for the purpose of determining priority.[2]

If a foreign creditor, by attachment or execution levied on movable property of an English bankrupt situated outside of England, secures payment of his claim, he can retain the advantage thus gained. He is not a subject of England, and therefore not bound by the English bankruptcy law. But if such a creditor, not having been able to collect the full amount of his claims from property of his debtor situated outside of England, wishes to prove the amount remaining unpaid, he will be allowed to do so only upon accounting for what he has received abroad. He need not come into the English court unless he wishes, but if he elects so to do, he must come in upon the same footing as all other creditors and be content with the same dividend.[3]

In this country the principles laid down by the English courts as just set forth would doubtless be generally accepted so far as the United States Constitution does not prevent, and the facts that each State is a separate jurisdiction and that a large business is often carried on to a greater or less extent in half of the United States tend to increase the importance of these principles. A provision in the Massachusetts Insolvency Law in regard to attachments has led to a further development of the law in that State. The Massachusetts statute provides that the assignment shall vest in the assignee not only " all the property of the debtor as of the time of the first publication of the notice of issuing the warrant in case of voluntary proceedings, and at the time of the

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[1] Hunter *v.* Potts, 4 T. R. 182; Sill *v.* Worswick, 1 H. Bl. 665; Phillips *v.* Hunter 2 H. Bl. 402.

[2] *Ex parte* Dobree, *Ex parte* Le Mesurier, 8 Ves. 82.

[3] Selkrigg *v.* Davis, 2 Dow, 230; s. c. 2 Rose, 291; *Ex parte* Wilson, L. R. 7 Ch. 490; Banco de Portugal *v.* Waddell, 5 App. Cas. 161; *Re* Bugbee, 9 N. B. R. 258.

first publication of notice of the filing of the petition in case of involuntary proceedings," but shall also "be effectual . . . to dissolve any attachment on mesne process made not more than four months prior to the time of the first publication aforesaid." [1] The national bankruptcy act contained a similar provision.[2]

On the strength of this provision an attempt was made in 1861, in the case of Dehon *v.* Foster,[3] to enjoin the defendant (a Massachusetts creditor of a Massachusetts bankrupt), who had before the insolvency made an attachment in Pennsylvania, from prosecuting his action to judgment and thereby reaping the benefit of his attachment. The case came up first on demurrer to the bill. It was argued exhaustively by eminent counsel on both sides, and upon careful consideration the demurrer was overruled, and subsequently the perpetual injunction sought by the plaintiff was granted. The case chiefly relied on by the court to support its decision overruling the demurrer was Mackintosh *v.* Ogilvie.[4] That case is obscurely reported, but apparently the defendant, a creditor, had made "arrestments" in Scotland of debts due the bankrupt there before the bankruptcy, but had not obtained "sentence" there till after the bankruptcy.

Lord Hardwicke granted a writ of *ne exeat* to prevent the defendant from leaving England, as it was alleged he was intending to do in order to escape suit by the assignees, and refused to discharge the writ unless the defendant gave security to abide the event of the cause.

Arrestment seems to be in the nature of a judicial proceeding, and to require an order of court enjoining the debtor from paying his creditor till the debt due the arrester has been satisfied.[5] If we can understand by the "sentence" referred to this order of injunction, it seems that it might well be held that the lien of the arrestment attached only from the latter date. This view is given color by the remark of the Lord Chancellor, Hardwicke, "It is then like a *subsequent* foreign attachment by the custom of London." And the case has generally been regarded as authority only for the point that a subsequent attachment abroad could not prevail against the assignees in an English bankruptcy.[6]

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[1] Pub. Stat. c. 157, § 46. [2] Rev. Stat. § 5044. [3] 4 Allen, 545; 7 Allen, 57.
[4] 3 Swanst. 365, *n.*; s. c. 4 T. R. 193, *n.*; s. c. Dickens, 119.
[5] Erskine's Inst., Title VI. § 2.
[6] See, *e.g.*, Phillips *v.* Hunter, 2 H. Bl. 402, 407; Westlake, Private Internat. Law, 150.

If the case is to be understood, however, as deciding that the title of such assignees would prevail over an attachment perfected abroad before the bankruptcy, it certainly has not represented the law of England for a century.[1]

It is perfectly clear that an English court would not enjoin an English creditor from obtaining the fruits of an attachment made before the bankruptcy, and the decision in Dehon *v.* Foster must rest entirely on the provision of the Massachusetts law dissolving attachments. That law does not purport to dissolve attachments made without the State, and in this differs from the provisions in all bankrupt laws vesting the title in the bankrupt's property in the assignees. Nor would the courts of another State on any principle of comity give an extra-territorial effect to the Massachusetts law dissolving attachments[2] as they would to the law vesting title to the bankrupt's movables in his assignee, with the limitation that it would not be allowed to operate injuriously to the citizens of the State whose laws are invoked to carry it into effect.

The decision in Dehon *v.* Foster must therefore be regarded as a distinct step in advance of the English law. The court meets this as follows: "To the suggestion that the attachment of the defendants was prior in point of time to the institution of the proceedings in insolvency, the answer is, that, on the facts stated in the bill, such priority does not impair the plaintiff's equity. We doubt very much whether the fact would be at all material, even if the attachment was made *bona fide*, and without any intent to defeat the operation of our insolvent laws; because it tends to contravene the clear intent of our statutes, which aim to vest in the assignee all the property of the debtor which could have been assigned by him or taken on execution against him at the time of the commencement of insolvent proceedings, 'although the same is then attached on mesne process as the property of the debtor.'

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[1] Cook's Bankrupt Laws, 6th ed., 326; *Ex parte* Dobree, *Ex parte* Le Mesurier, 8 Ves. 82; *Re* Chapman, L. R. 15 Eq. 75.

[2] Kidder *v.* Tufts, 48 N. H. 121. In this case it was held that citizens of Massachusetts who had attached property in New Hampshire and were prosecuting their attachments to judgment after proceedings in insolvency had been instituted in Massachusetts against their debtor were entitled to do so, and that any remedy must be in the form of an injunction by the Massachusetts court against its own citizens. See, also, Pane *v.* Lester, 44 Conn. 196; Rhawn *v.* Pearce, 110 Ill. 350; Hibernia National Bank *v.* Lacombe, 84 N. Y. 367.

It is true that it does not in terms provide that an attachment in other States shall be dissolved, because such an enactment would be without the force of law, as against attachments which are valid according to the laws of the place where they are made. But they nevertheless operate to divert property from the assignees and create preferences, and so are against equity as between citizens of our own State." The court adds that it further appeared from the bill that the defendants, when they made their attachment, knew that the debtors were insolvent, and had reason to believe that proceedings in insolvency were about to be instituted against them, and that this "purpose to interfere with and prevent the proper distribution of the property of the insolvent takes away all claim to equitable consideration which might exist when priority was obtained in good faith." But subsequently, in making the injunction perpetual, the court held — "The intent with which the defendants made the attachment does not affect the equitable right of the assignees."[1]

While it may be thought that the rule laid down in Dehon *v.* Foster is somewhat in the nature of judicial legislation, inasmuch as under this rule the courts practically give a certain extra-territorial force to the Insolvency Law which it would not otherwise have either by virtue of the statute itself or by comity, yet it is true, as the court says, that making such attachments or garnishments in another State is contrary to the spirit and intent of the Insolvent Law, which seeks to vest in the assignee all of the bankrupt's property free from attachments not more than four months old, and that for a creditor to go from his own jurisdiction and that of his debtor into a foreign jurisdiction, to acquire an advantage expressly and purposely denied him in the former, is an attempt to evade the law of the State of which he is a subject. Further, it cannot be doubted that the operation and effect of the rule have been extremely beneficial. It has forced creditors to come into the Insolvency Court and prove their claims. Without it, on the first intimation of a failure, there would be a general scramble of creditors to lay hold of something outside the State by garnishment or attachment; much of the estate would be wasted in legal costs and otherwise; for a creditor who has attached property to the value of ten thousand dollars to secure a claim of five thou-

[1] Dehon *v.* Foster, 7 Allen, 57.

sand dollars has no object in realizing more than five thousand dollars and costs from the property attached. The greatest inequality would prevail among the creditors; and by a little information to favored creditors a bankrupt could in effect prefer them, without having made what would in law constitute a preference. In view of these considerations of law and fact, the case of Dehon *v.* Foster seems to have been well decided. It certainly is no greater stretch of the powers of a court of equity than English Chancellors in earlier days often made in support of what they conceived to be just. The case has been somewhat followed in this country in an analogous class of cases in which a creditor, with a view to evade the exemption laws of the State where he and his debtor reside, makes an attachment or garnishment in another State of goods or credits of his debtor which are exempt from attachment or execution in the State where both parties are domiciled. It has been held in Indiana,[1] Kansas,[2] Maryland,[3] and Ohio[4] that the creditor may be enjoined in the State of his domicile from prosecuting such an attachment.

Twenty years after the decision in Dehon *v.* Foster, the case of Lawrence *v.* Batcheller[5] arose. This was similar in its facts to the earlier case, with the additional circumstance that the creditor, after the insolvency, and before action brought by the assignees, had obtained judgments and collected the amount of his claim by means of garnishments made, as in Dehon *v.* Foster, shortly before the insolvency, and with knowledge that it was likely to occur. The action was an action of contract to recover the amount so collected by the creditor. It was decided by the court that the plaintiffs could not recover. The grounds on which the court decided the case were in substance that the case was not within the statutes, for no reference was made in them to attachments outside the State; nor within the English precedents, for they allowed a recovery only when the attachments were subsequent to the bankruptcy; nor within the principle of Dehon *v.* Foster, for reasons which the court stated as follows: "The argument of the plaintiffs in the case at bar is, that, as it was contrary to equity for the defendant to proceed with his suits to judgments, and to a satisfaction of the judgments from the funds attached, so it is contrary to

[1] Wilson *v.* Joseph, 107 Ind. 490.
[2] Zimmerman *v.* Franke, 34 Kas. 650.
[3] Keyser *v.* Rice, 47 Md. 203.
[4] Snook *v.* Snetzer, 25 Ohio St. 516.
[5] Lawrence *v.* Batcheller, 131 Mass. 504.

equity for him to retain the money so obtained; and that they can maintain an action at law against the defendant for money had and received to their use, because the money *ex æquo et bono* belongs to them. This argument rests on the assumption that courts of law will afford a remedy in damages for all wrongs done, which courts of equity, if seasonably applied to, will prevent; but this is not true. Courts of equity recognize and enforce rights which courts of law do not recognize at all; and it is often on this ground that defendants in equity are enjoined from prosecuting actions at law."

The grounds of distinction thus suggested it is believed are untenable. If it was so inequitable for the defendant to proceed with his suits to judgment that a court of equity would enjoin him from so doing, his obtaining judgments and satisfying them would not better his position. He would hold the amount so collected as a constructive trustee. If it was inequitable to acquire the money it was inequitable to hold the money. Where parties have equal equities or are *in pari delicto*, the acquisition of the legal title determines their respective rights, but only in those cases. And as to the remedy being at law, where a plaintiff seeks to recover a liquidated amount from a constructive trustee, the count of money had and received is a proper remedy,[1] and the action of contract under the Massachusetts Practice Act includes this.

There is, however, another ground suggested for the decision: "It is, to say the least, doubtful if the regularity of the proceedings in those actions in reference to the attachments and the conclusiveness of the judgments charging the garnishees therein can be called in question in this suit. Green *v.* Van Buskirk, 5 Wall. 307, and 7 Wall. 139."

In Green *v.* Van Buskirk, one Bates, who lived in New York, executed and delivered to Van Buskirk, who lived in the same State, a chattel mortgage of safes situated in Chicago. Later, Green, also a citizen of New York, in ignorance of the mortgage, attached the safes in Illinois as the property of Bates, and having obtained judgment, satisfied it from the proceeds of the safes.

[1] Buttrick *v.* King, 7 Met. 20; Sewell *v.* Patch, 132 Mass. 326.

In the former case, Shaw, C. J., thus expresses this principle: "But when it (the property sought to be recovered) remains wholly in money in the hands of the defendant . . . an action for money had and received — *which is in the nature of a bill in equity* — when nothing remains to be done, but the payment of money, may be maintained.

Van Buskirk was not a party to the action, but he might have made himself such. By the law of Illinois, unrecorded chattel mortgages were void against third persons. Van Buskirk subsequently brought an action in New York to recover the proceeds of the safes obtained by Green by means of his attachment in Illinois. The New York court rendered judgment in favor of Van Buskirk, and on writ of error the case was carried to the Supreme Court of the United States, and the decision reversed on the ground that full faith and credit had not been given to judicial proceedings in Illinois.

It seems impossible to distinguish the case of Lawrence *v.* Batcheller from Green *v.* Van Buskirk. It seems clear that the Supreme Court of the United States would have reversed the decision of the Massachusetts court had the latter decreed that the defendant should pay over the amount collected by him in other States, on the ground, that such a decree amounted in effect to a reversal by the court of one State of the judgment of the court of another; and the decision should be rested solely on constitutional grounds.

It has been decided in a recent case in the Supreme Court of the United States[1] that it is not unconstitutional to enjoin prosecuting an attachment suit in another State, as was done in Dehon *v.* Foster, though it was argued that in so enjoining an attachment the court was refusing to give credit to a lien granted by another State. This argument was met by the opinion of the majority of the court delivered by Chief Justice Fuller, thus: "The lien is inchoate and the property attached held to await the result of the suit. If a judgment for the plaintiff is obtained, the lien becomes perfected and the property is applied to satisfy the judgment. If plaintiff fails in his action the lien falls with it. And he may so fail by reason of the discharge of the defendant in insolvency, when he is a citizen of the same State, or has made himself a party to the proceedings in insolvency, or by the action of other courts of the State where the suit is pending, or elsewhere, if jurisdiction *in personam* be obtained."[2] Justice Miller, with whom concurred Justices Field and Harlan, wrote a vigorous dissenting opinion. Both opinions indicate that had the creditor collected his debt he could not have been deprived of his advantage.

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[1] Cole *v.* Cunningham, 133 U. S. 107.

[2] 133 U. S. 107, 116.

In spite of the rule established by Lawrence *v.* Batcheller and confirmed on constitutional grounds, that if a creditor had actually collected, though after bankruptcy, the amount of a judgment from property of his insolvent debtor situated outside the State he could retain it, assignees in Massachusetts were generally enabled to prevent such advantages from being obtained. If a creditor had not obtained his foreign judgment before the bankruptcy, he would rarely be able to obtain it afterwards, as the assignee would usually be able to file a bill in equity praying for an injunction within a few days from the date of bankruptcy.

Attempts were made by creditors to escape from the liability to injunction, and to bring attachments and garnishments made by them on the eve of the bankruptcy of their debtor within the protection of the United States Constitution. Thus in Cunningham *v.* Butler, 142 Mass. 47, the creditors made without consideration an assignment of their claim to a citizen of the State where the attachment was sought, and an attachment was then made — all before the beginning of insolvency proceedings. On a bill to enjoin the attachment suits filed by the assignees against the creditors, the court found as a fact that those suits were still subject to the control of the defendants, the creditors, and therefore held that the case was indistinguishable from Dehon *v.* Foster, and granted an injunction.

Again, in Proctor *v.* The National Bank of the Republic, 152 Mass. 223, the same attempt was made, and this time more successfully. Instead of making a colorable assignment of its claim, the creditor, the National Bank of the Republic, made an absolute assignment, and relinquished all its rights to the attachment suit which it had begun; giving, however, a guarantee to make good to the purchaser any deficit in the amount collected, and also all costs of prosecuting the attachment suit. It was held that the assignees were without remedy; that the guarantee was a collateral agreement not affecting the title of the purchaser of the claim; that, therefore, an injunction against the defendant would be useless, as it had not control of the attachment suit, and that on the question of recovering the value received by the defendant for its sale — not simply of its claim, but of its attachment — the case fell within the principle of Lawrence *v.* Batcheller.

The correctness of the decision can hardly be questioned, but the result is none the less to be regretted. It is usually possible

for a creditor having a good commercial rating to give a satisfactory guarantee, and by so doing make a sale of his claim, as in Proctor *v.* The National Bank of the Republic, thereby reaping the fruits of an attachment or garnishment hastily made beyond the limits of the State. The class of creditors who will gain most will be the class who could best endure a loss; namely, those having a large capital and extended business connections. Creditors in general will not receive so much from insolvent debtors as formerly, and the loss will fall with most certainty on those who have not sufficient credit to enable them to make hastily such a sale as is now under consideration — the very ones to whom the loss of a percentage of their claims is of greatest importance.

Numerous minor questions bearing on this topic are arising, and are likely to continue to arise, in Massachusetts. For instance, Can a creditor, having obtained an advantage, as in Lawrence *v.* Batcheller or Proctor *v.* The National Bank of the Republic, subsequently prove other claims in the Insolvency Court on the same footing as other creditors? Will the court grant an injunction at the suit of a debtor who has made a composition with his creditors under the statute authorizing that mode of settlement? How far will the fact that an injunction of the attaching creditor will probably cause an attachment to be made by a foreign creditor, who cannot be enjoined, affect the case? And will the court grant a mandatory injunction in such a case, ordering the attachment suit to be prosecuted to judgment for the benefit of the assignees?

But, however these points may be decided, it is now impossible to prevent an active and well-advised creditor who is able to give a satisfactory guarantee from obtaining an advantage at the expense of other creditors. The only conclusion to be drawn is that satisfactory distribution of property in bankruptcy can only be made by means of a National Bankruptcy Act.

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CAMBRIDGE.